Criminal Division
Filed: 5/13/77

No. 76-1596

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN MAURO and JOHN FUSCO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 544 F.2d 588. The opinion of the district court (App. E, *infra*) is reported at 414 F.Supp. 358.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on October 26, 1976. A petition

for rehearing with a suggestion for rehearing *en banc* was denied on March 15, 1977 (Apps. C and D, *infra*). On April 11, 1977, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including May 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of *habeas corpus ad prosequendum* issued by a federal court to state authorities, directing the production of a state prisoner for trial on federal criminal charges, constitutes a detainer making applicable the terms and conditions of the Interstate Agreement on Detainers Act.

STATUTES INVOLVED

1. Section 2 of the Interstate Agreement on Detainers Act, 84 Stat. 1397-1402, 18 U.S.C. App., pp. 4475-4477, provides in pertinent part:

Article II

As used in this agreement:

(a) 'State' shall mean a State of the United States; the United States of America * * *.

* * * * *

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer

and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated * * *.

* * * * *

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

2. 28 U.S.C. 2241 provides in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. * * *

* * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

(5) It is necessary to bring him into court to testify or for trial.

STATEMENT

1. In separate indictments filed in the United States District Court for the Eastern District of New York, respondents John Mauro and John Fusco were charged with criminal contempt of court, in violation

of 18 U.S.C. 401. The charges stemmed from respondents' refusal to testify, despite a grant of immunity, before a federal grand jury investigating violations of the federal drug laws (G. App. 1, 3, 5-6).[1]

At the time that the indictments were returned, respondents were incarcerated at different New York State correctional facilities serving sentences on state criminal charges.[2] Pursuant to separate writs of *habeas corpus ad prosequendum* issued by the United States District Court for the Eastern District of New York on November 5, 1975, each respondent was transferred from state to federal custody and produced before the district court for arraignment.[3] On November 24, 1975, respondents were arraigned upon their respective indictments and entered pleas of not guilty (G. App. 1, 3). They were then retained in federal custody at the Metropolitan Correctional Center in New York City.

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[1] "G. App." refers to the government's appendix in the court of appeals.

[2] Respondent Mauro was serving a sentence of three years to life imprisonment at the Auburn, New York, Correctional Facility, and respondent Fusco was serving a sentence of one year to life imprisonment at the Clinton Correctional Facility, Dannemora, New York (App. A, *infra*, p. 2a n. 1).

[3] Each writ was directed to the United States Marshal for the Eastern District of New York and the warden of the appropriate state correctional facility and ordered that respondents be produced before the district court on November 19, 1975 (G. App. 121, 125).

Subsequently, on December 2, 1975, both respondents appeared before the district court for the purpose of establishing trial dates. After setting dates that were acceptable to counsel for respondents, the court observed that the Metropolitan Correctional Center was "overcrowded" (G. App. 70). Accordingly, the court directed that respondents be returned to their respective state prisons and thereafter be "writ[ted] down" for federal trial. After further discussion, respondent Fusco expressed a preference to return to state prison, while respondent Mauro asked to remain at the Metropolitan Correctional Center if the warden had no objection (G. App. 69-71, 74-75). Shortly thereafter, both respondents were returned to state custody.

2. On April 26 and April 29, 1976, respectively, respondents Mauro and Fusco were again produced before the district court by means of writs of *habeas corpus ad prosequendum*. Prior to these appearances, respondents had moved for dismissal of their indictments on the ground that they had been returned to state custody without having first been tried on the federal charges, in violation of Article IV(e) of the Interstate Agreement on Detainers Act ("Agreement").[4] Article IV of the Agreement provides that the prosecuting authority of a member state in which criminal charges are pending against a defendant

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[4] The United States joined the Agreement by Act of December 9, 1970, Sections 1-8, 84 Stat. 1397-1403, 18 U.S.C. App., pp. 4475-4478.

Pub. L. 91-538,

serving a prison sentence in another member jurisdiction may lodge a detainer with the prison authority of that jurisdiction and, upon written request, obtain temporary custody of the prisoner for purposes of trial. The Agreement further provides that the prisoner must be tried (a) within 120 days of his arrival in the receiving state and (b) prior to being returned to the sending state, or the charges against him shall be dismissed with prejudice. Article IV(c) and (e).[5]

The district court granted respondent Mauro's motion to dismiss the indictment in an opinion and order dated May 17, 1976. The court then granted respondent Fusco's motion to dismiss on May 19, 1976, citing its decision in *Mauro* (G. App. 2, 4). The district court in *Mauro* rejected the government's argument that, because no detainer had been lodged against Mauro[6] and because Mauro had been pro-

[5] Article III provides that a prisoner may invoke the transfer provisions of the Agreement, when a detainer has been lodged, by filing a request with the appropriate authorities in the prosecuting jurisdiction for final disposition of the charges against him. He must thereupon be brought to trial (a) within 180 days of delivery of this request and (b) without being returned to the sending state after having been sent to the prosecuting state, or the charges shall be dismissed with prejudice. Article III(a) and (d).

[6] Although the district court opinion makes reference to a detainer lodged against respondent Mauro on July 9, 1975 (App. E, *infra*, p. 30a), this detainer related only to an earlier civil contempt adjudication; as respondent conceded (G. App. 101), it is therefore irrelevant to the subsequent criminal contempt prosecution at issue here. Both courts below ap-

duced before the district court solely pursuant to a writ of *habeas corpus ad prosequendum*, the provisions of the Agreement were inapplicable and provided no basis for dismissing the indictment. The court held that whenever the Agreement is "available" to produce a defendant for purposes of prosecution, "it is the exclusive means for doing so and the Government is charged with having invoked its provisions by use of the writ" (App. E, *infra*, p. 40a).

3. A divided panel of the court of appeals affirmed (App. A, *infra*, pp. 1a-23a). The majority concluded, as had the district court, that the writ of *habeas corpus ad prosequendum* is the equivalent of a detainer and that its use by federal officials in this case triggered the operation of the Agreement.[7] According to the majority, "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ" (*id.* at 8a; footnote omitted).[8]

In dissent, Judge Mansfield emphasized the significant functional and legal differences between a detainer and the writ *ad prosequendum*. He con-

parently agreed, since neither placed any reliance upon the existence of this detainer.

[7] At all times relevant hereto, New York was a party to the Agreement. N.Y. Crim. Proc. L. § 580.20 (1971).

[8] The court recognized (App. A, *infra*, p. 18a) that the writ "would have to be resorted to" whenever the United States sought to obtain the presence of a prisoner in a non-participating jurisdiction. At present there are four such jurisdictions: Alabama, Alaska, Mississippi, and Oklahoma.

cluded that the writ is not a detainer but rather a mandatory federal court order issued under the express authority of a federal statute (28 U.S.C. 2241 (c)(5)) that was neither repealed nor modified by the Agreement (App. A, *infra*, pp. 17a-19a, 23a). As a result, he would have ruled that the Agreement applies only to prisoners against whom detainers have been lodged and not to prisoners, like respondents, who are produced solely pursuant to the writ.[*] The Agreement, therefore, provided no basis for dismissal of the indictments in this case.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals in this case, holding that a writ of *habeas corpus ad prosequendum* is a detainer within the meaning of the Interstate Agreement on Detainers, is in conflict with decisions of the Court of Appeals for the Seventh Circuit (*United States* v. *Ricketson*, 498 F.2d 367), and the Court of Appeals for the Fifth Circuit (*United States* v. *Scallion*, 548 F.2d 1168, petition for a writ of certiorari pending, No. 76-6559). Moreover, because federal prosecutors have regularly se-

[*] Since no detainers had been lodged against respondents, this case does not present the issue whether use of the writ *ad prosequendum* after the federal government has lodged a detainer against a prisoner functions as a "request" under the Agreement and subjects the government to the terms of the Agreement. See *United States* v. *Ford*, 550 F.2d 732 (C.A. 2), rehearing denied, May 9, 1977.

cured the presence of state prisoners for trial by means of the historical writ of *habeas corpus*, rather than by invoking the provisions of the Interstate Agreement on Detainers, and have quite commonly returned those prisoners to state facilities pending trial, the uncertainty created by such conflict affects a substantial number of past and pending cases and provokes confusion in the implementation of both the federal *habeas corpus* statute and the Agreement. This Court should resolve this conflict.

1. In *United States* v. *Ricketson*, *supra*, the court expressly rejected the defendant's argument that pending federal charges against him should have been dismissed under the Interstate Agreement on Detainers because federal authorities, having secured his presence by a writ of *habeas corpus ad prosequendum*, had returned him to state prison without trial. Acknowledging that the defendant had been delivered from and returned to state custody three times before trial, the court nevertheless noted (498 F.2d at 373) that "each federal custody was before any detainer was filed, so that the Agreement is inapplicable." That conclusion is directly contrary to the holding of the majority below that the writ itself is a detainer for purposes of the Agreement.

The Court of Appeals for the Fifth Circuit, in *United States* v. *Scallion*, *supra*, has taken a similar view. In *Scallion*, the defendant was produced in federal court by a writ of *habeas corpus ad prosequendum* in December 1973, returned to state prison without trial, and then produced again by writ of

habeas corpus ad prosequendum for trial in September 1974. He sought dismissal of the federal charges because he had been returned to the state prison [10] and because he had not been tried within 120 days of the December 1973 production, as he claimed was required by Article IV(c) of the Agreement. The court of appeals, noting that "[b]oth historically and substantively, the writ of habeas corpus ad prosequendum issued by a federal district court is entirely different from a 'detainer' [as defined in the House and Senate Judiciary Committee Reports]" (548 F.2d at 1173), rejected Scallion's contention (*ibid.*; footnotes omitted): [11]

> The writ of habeas corpus ad prosequendum issued by a federal district court is an order commanding the production of a prisoner promptly or by a specified date, whereupon he is turned over to a federal custodian, usually a U.S. Marshall; whereas a detainer is merely a notice that the prisoner is wanted to face pending criminal charges and requires further process ("a written request for temporary custody or availability," as provided in Article IV(a)) before the

[10] Scallion was returned to state prison at his request. The court of appeals held, therefore, that he was estopped from obtaining dismissal of his federal charges under Article IV (e) of the Agreement. As we discuss in the text, the court was nevertheless required to consider whether the defendant was entitled to dismissal of charges for failure to comply with the speedy trial provisions of the Agreement.

[11] In a footnote the court stated (548 F.2d at 1173 n. 8): "We cannot follow the Second Circuit's holding to the contrary in a split decision in *United States* v. *Mauro* • • •."

> prisoner is turned over. There is nothing in the Act or its legislative history indicating any intent that the definition of a detainer be stretched to the point of including an order under a writ of habeas corpus ad prosequendum issued by a federal district court pursuant to authority of 28 U.S.C. § 2241(c)(5), and we regard it as incredible that the Judiciary Committees of both the House and Senate would fail to even mention the writ had such been the intent. Accordingly, we conclude that "detainer" for purposes of the Act does not include a writ of habeas corpus ad prosequendum issued by a federal district court. It follows, and we so hold, that the Agreement does not apply to such a writ.

2. The decision in this case, if widely followed, would require the dismissal of numerous federal indictments, and perhaps the vacation of many more federal convictions, despite the fact that federal prosecutors and district courts, in securing attendance of state prisoners by means of a writ of *habeas corpus ad prosequendum*, proceeded upon the authority of an existing federal statute.[12] Prior to the district court's decision in *Mauro*, federal prosecutors

[12] The writ derives from ancient common law usage and more particularly from Section 14 of the First Judiciary Act, 1 Stat. 81. See, *e.g.*, *Ex parte Bollman*, 4 Cranch 75, 95-98; *Ex parte Burford*, 3 Cranch 448, 449; *Carbo* v. *United States*, 364 U.S. 611, 614.

The detainer is of much more recent vintage and is nothing more than a notification, from one State to another, that a particular inmate is wanted to face charges in the notifying State.

and defense counsel generally assumed that the Agreement did not apply to production of prisoners by writ of *habeas corpus ad prosequendum*, particularly when no detainer had been lodged with state prison authorities.[13] Insofar as we can determine, the uniform practice of federal prosecutors, before and after enactment of the Agreement by Congress in 1970, has been to apply to the district courts for writs of *habeas corpus ad prosequendum* and, upon conclusion of the proceeding for which the state prisoner was produced, to move for satisfaction of the writ and return of the prisoner "from whence he came." We believe that this practice is entirely reasonable; "[t]he legislative history of the Interstate Agreement on Detainers Act • • • makes it clear that Congress did not intend the machinery established thereby to be the exclusive means of effecting a transfer of a prisoner for purposes of prosecution" (*United States* v. *Scallion*, *supra*, 548 F.2d at 1171).

After the district court's decision in *Mauro*, litigation of claims under the Agreement has increased markedly. The question whether the Agreement provides the sole means by which federal prosecutors can secure the presence of state prisoners is now

[13] Defense counsel in *United States* v. *Ricketson*, *supra*, did argue that the agreement applied to a writ of *habeas corpus ad prosequendum*, even in the absence of a detainer. That contention was rejected (see p. 9, *supra*), and no further cases raising the issue in the context of a federal writ were reported before the decision of the district court in *Mauro*. Cf. *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830 (C.A. 3) (state writ issued to federal authorities).

pending in, or has recently been decided by, several circuits. *United States* v. *Kenaan*, 422 F. Supp. 226 (D. Mass.), appeal pending, C.A. 1, No. 77-1014, argued April 5, 1977; *United States* v. *Ford*, 550 F.2d 732 (C.A. 2), rehearing denied, May 9, 1977; *United States* v. *Cyphers and Ferro*, C.A. 2, Nos. 76-1131, 76-1160, decided February 8, 1977, pending on petition for rehearing and rehearing *en banc*; *United States* v. *Sorrell*, C.A. 3, No. 76-1647, decided November 29, 1976, vacated January 27, 1977, argued *en banc* May 12, 1977; *United States* v. *Scallion*, *supra*; *United States* v. *Roberts*, 548 F.2d 665 (C.A. 6); *Walker* v. *United States*, E.D. Mich., Civ. No. 6-72286, Cr. No. 5-81211, decided March 24, 1977; *Speed* v. *United States*, C.A. 8, No. 76-1126, appeal pending; *United States* v. *Adkins*, C.A. 9, No. 76-3523, appeal pending.[14] In addition, federal courts have been asked to decide whether defendants may raise the applicability of the Agreement for the first time on appeal (*United States* v. *Cyphers and Ferro*, *supra*) and on motions for relief under 28 U.S.C. 2255 (*Speed* v. *United States*, *supra*; *Walker* v. *United States*, *supra*; *Strawderman* v. *United States*, E.D. Va., No. 76-0490-R). One district court has ruled that failure to seek dismissal of charges under the Agreement, after service of a writ and return of

[14] Federal authorities had filed detainers in *Ford*, *Cyphers and Ferro*, *Sorrell*, and *Speed*. Those cases, therefore, involve the question whether, if the Agreement applies, a writ of *habeas corpus ad prosequendum* is a "request" within the meaning of Article IV(a). See note 9, *supra*.

the prisoner to state prison, by itself constitutes ineffective assistance of counsel entitling a convicted defendant to relief (*Walker* v. *United States, supra*).

At present, federal prosecutors cannot be sure whether they may continue the historical practice of securing prisoners by writ of *habeas corpus* and returning them to state prison after satisfaction of the writ or whether they must abandon that practice and proceed solely under the Agreement. There are few federal detention facilities throughout the country designed for the purpose of holding prisoners awaiting trial, and such facilities as do exist are often overcrowded. Because retention of state prisoners in federal facilities is often difficult, as in the present case, and because the state facilities in any event may be located only a short distance from the federal court, application of the Agreement will frequently be undesirable and unnecessary. Yet a failure to follow the Agreement now results in dismissal of federal charges with prejudice under Article IV (e) in an increasing number of jurisdictions. Resolution of this uncertainty is therefore of considerable importance to the effective administration of the federal criminal laws.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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MAY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 183, 184—September Term, 1976

(Argued September 13, 1976
Decided October 26, 1976)

Docket Nos. 76-1251, 76-1252

UNITED STATES OF AMERICA, APPELLANT

—against—

JOHN MAURO AND JOHN FUSCO, APPELLEES

Before: ANDERSON, MANSFIELD and MULLIGAN, *Circuit Judges.*

MULLIGAN, *Circuit Judge*:

This is a consolidated appeal by the United States from two orders which dismissed indictments against two defendants because of the Government's failure to comply with the Interstate Agreement on Detainers, 18 U.S.C., App. The issue involved is one of first impression in this court.

On November 3, 1975, John Mauro and John Fusco were separately indicted in the Eastern District of New York on charges of criminal contempt of court in violation of 18 U.S.C. § 401. Both had refused to testify before a federal grand jury and at the time of their indictment both were inmates in New York State penal institutions.[1] On November 5, 1975 separate writs of *habeas corpus ad prosequendum* were issued by a district judge of the United States District Court, Eastern District of New York, directing the wardens of each of the New York State institutions to produce the inmates before the federal court on November 19, 1975. On November 24, 1975, Mauro and Fusco were arraigned before Hon. John R. Bartels of the Eastern District of New York, and both pleaded not guilty. On December 2, 1975 both again appeared before Judge Bartels for the purpose of fixing a trial date. Mauro's counsel agreed to a March 17, 1976 date and Fusco's counsel accepted a February 4, 1976 trial date. In view of the crowded conditions at the Metropolitan Correctional Center, Judge Bartels ordered the defendants to be returned to state custody indicating that each should be "writ down" shortly before the federal trials.[2]

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[1] Mauro was serving a three-year to life term at the Auburn Correctional Facility, Auburn, New York. Fusco was serving a one-year to life term at the Clinton Correctional Facility, Dannemora, New York.

[2] Transcript of Dec. 2, 1975, Proceedings before Judge Bartels, at 7-8 (Govt. App. at 70-71).

On March 2 and April 14, 1976 respectively, writs of *habeas corpus ad prosequendum* were again issued for Fusco and Mauro who were produced in the Eastern District of New York on April 29 and April 26, 1976. Prior to their appearance each defendant had separately moved for dismissal of his indictment on the ground that the United States had violated Article IV(e) of the Interstate Agreement on Detainers since he had been returned to state custody without having first been tried on the federal indictments. In an opinion and order dated May 17, 1976, reported in 414 F. Supp. 358 (E.D.N.Y. 1976), Judge Bartels granted Mauro's motion and dismissed the indictment. On May 19, 1976, he granted Fusco's motion to dismiss on the basis of his prior opinion in the Mauro motion. This appeal followed.

I

The Interstate Agreement on Detainers (Agreement) was enacted into law by the Congress in 1970 on behalf of the United States. It had already been adopted by 28 states and since then by all of the remaining states with the exception of Alabama, Alaska, Mississippi and Oklahoma. Its purpose and objectives are set forth in Article I:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs

of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II(a) further provides:

> 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

The legislative history of the Agreement is not particularly enlightening probably because there was no opposition in Congress to its enactment. See 116 Cong. Rec. 38840 (1970). In essence Article III provides a mechanism for a prisoner in a party State against whom a detainer has been lodged by any other party State to request a final disposition of the untried charge within 180 days of his written request. By the same token Article IV provides a method for prosecutors to secure prisoners serving sentences in other jurisdictions for a prompt trial within 120 days after his arrival in the receiving

jurisdiction. In explaining the need for the legislation Congressman Kastenmeier, its sponsor, stated:

> The Bureau of Prisons has advised that a prisoner who has a detainer lodged against him is seriously disadvantaged. He is in custody and cannot seek witnesses or preserve his defense. He must often be kept in close custody and is ineligible for desirable work assignments. Thus he may lose interest in institutional opportunities because he cannot tell when, if ever, he will be in a position to use the skills he is developing. The agreement offers a prisoner the opportunity to secure a greater degree of certainty as to his future and enables prison authorities to provide better plans for his treatment.
>
> On the other hand, the agreement also provides a method for prosecutors to secure prisoners serving sentences in other jurisdictions for trial, before the passage of time has dulled the memory or made witnesses unavailable.

Where, as here, the prosecutor initiates the statutory mechanism the defendant is not only entitled to a trial within 120 days but Article IV(e) provides:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

II

The United States on appeal, as it did below, seeks to avoid the clear impact of Article IV(e) by arguing that the defendants here were produced by the writ of *habeas corpus ad prosequendum*, which it urges should not be treated as a detainer under the Agreement.[3] The Government argues that the habeas writ here employed is the traditional and time-honored method employed by federal courts to obtain state prisoners for trial pursuant to 28 U.S.C. § 2241 (c)(5). While this may be perfectly true, it does not follow that the habeas writ is not a detainer within the Agreement. The term is not defined in the Agreement. However, Congressman Kastenmeier, in proposing the Agreement, stated, "For the purpose of this legislation a detainer is a notification filed with the institution in which a prisoner is serving

[3] The Government contends that appellee Fusco waived his rights under Article IV(e) because he requested to be returned to the state prison following his arraignment. Immediately prior to Fusco's request, the request of another defendant (Robert Marino) to remain in federal custody was denied because of overcrowding in the correctional center. In light of this, it would have been futile for Fusco to make the same request before the same judge. Moreover, for it to have been effective as a waiver it must have been an "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). The record is barren of any indication that this was so. Fusco did all that was required of him to claim his remedy under Article IV(e)—"allege that one jurisdiction has requested his transfer from another jurisdiction for trial and returned him without trying him to the first jurisdiction." *United States* v. *Cappucci*, 342 F. Supp. 790, 793 (E.D. Pa. 1972).

a sentence, advising that he is wanted to stand trial on pending criminal charges in another jurisdiction." 116 Cong. Rec. 13999 (1970). The same language is employed in the Senate Report. S. Rep. No. 1356, 91st Cong., 2d Sess., 3 U.S. Code and Admin. News 4864, 4865 (1970). This is substantially the notification filed with the state prison wardens in the instant case.[4]

The Government urges however that the habeas writ is mandatory and compels the production of the state prisoner and therefore is not comparable to a detainer.[5] However, as this court has recently noted,

[4] Thus that original writ served on the warden of the Auburn Correctional Facility provided:

> YOU ARE HEREBY COMMANDED to have the body of John Mauro now detained under your custody, as it is said, under safe and secure conduct, in civilian clothes, before the United States District Court for the Eastern District of New York, at the United States Courthouse, in such courtroom as shall be designated, in the Borough of Brooklyn, City, State and Eastern District of New York, on the 19th day of November at 10 o'clock in the forenoon of that day, for trial before said United States District Court for the Eastern District of New York upon an indictment filed in said Eastern District of New York against the said John Mauro charging him with violation of Title 18 United States Code, Section 401 and, at the termination of the proceedings in the said United States District Court on that particular day, that you return him forthwith to the Warden, Auburn Correctional Facility, Auburn, N.Y. under safe and secure conduct.

The writ served to obtain Fusco was in the same form.

[5] This argument is allegedly bolstered by the language of the statute. It is the Government's contention that since Article IV(a) provides that "the Governor of the sending

"While a writ of *habeas corpus ad prosequendum* may use mandatory language, the jurisdiction to which such a writ is addressed is relied upon to cooperate in turning over the defendant to the other sovereign." *United States* v. *Oliver*, 523 F.2d 253, 258 (2d Cir. 1975). See also *Carbo* v. *United States*, 365 U.S. 611, 621 (1961). In the *Oliver* case, the first federal habeas writ granted in March 1973 was not executed because of the need of the Michigan prosecutor to expeditiously dispose of pending state proceedings and a second writ was necessary in July 1973. We conclude that the writ of *habeas corpus ad prosequendum* is a detainer entitling the state inmate to the protection provided in Article IV [6] and specifically to a trial before his return to the state institution. Any other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ.[7]

State may disapprove the request for temporary custody or availability," the United States is excluded by the very language of the provision from availing itself of that option. However, since 18 U.S.C. App., § 3 provides, "The term 'Governor' as used in the agreement on detainers shall mean with respect to the United States, the Attorney General . . . .", this contention is without merit.

[6] We note that Article IV(c) permits continuances beyond the 120 day limit for good cause shown but that Article IV(e) creates no exceptions to the requirements that the defendant not be returned to state custody untried. *United States* v. *Ricketson*, 498 F.2d 367, 373 (7th Cir.), cert. denied, 419 U.S. 965 (1974).

[7] "There is a presumption against construing a statute as containing superfluous or meaningless words or giving it a

In *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830 (3d Cir. 1975), where a federal prisoner was produced in a state court pursuant to a writ of *habeas corpus ad prosequendum* secured by a state prosecutor, the state similarly argued that since the request was made pursuant to a habeas writ and not pursuant to Article IV of the Agreement, its remedial provisions were not relevant. In rejecting this argument the Third Circuit held that the Agreement provided the exclusive means of effecting a transfer between two participating jurisdictions for the purpose of prosecution. Id. at 837; accord, *United States* v. *Sorrell*, 413 F. Supp. 138, 140 (E.D. Pa. 1976). See also statement of Senator Hruska, 116 Cong. Rec. 38840 (1970), "By approving [the Agreement] we can insure that the United States will become part of this vitally needed system of simplified and uniform rules for the disposition of pending criminal charges and the exchange of prisoners."

It has been suggested that the habeas writ, since it is executed at once, cannot have the adverse effects upon rehabilitation which the Agreement was designed to avoid. While it is true that the expeditious disposition of pending charges in another jurisdiction was a prime concern of the Agreement, it was also its aim to eliminate the uncertainties which obstruct programs of prisoner treatment and rehabilitation. Article IV makes it clear that the prisoner was not

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construction that would render it ineffective." *United States* v. *Blasius*, 397 F.2d 203, 207 n. 9 (2d Cir. 1968).

only to be tried promptly but that he would not be sent back until tried by the requesting jurisdiction. In this case both prisoners were sent back in December 1975, to state prisons with trial dates set for federal trials and were not brought back to the federal forum until late in April 1976. Their ability or even desire to participate in state treatment or rehabilitative programs was obviously affected by the uncertainties of the federal trial and the possible sentence to be meted out. In view of the clear language of Article IV(e), we believe the Agreement was plainly designed to avoid the shuttling of prisoners back and forth between the penal institutions of the two jurisdictions. The disruptive effect upon the prisoner's morale is the same irrespective of the caption on the paper which produces him in the jurisdiction seeking him for trial. The participating parties to the Agreement have moreover solemnly promised that his trial will be expeditious and will take place before he is returned on penalty of a dismissal of the indictment with prejudice.

III

The Government further argues that the United States adopted the Agreement only as a sending and not a receiving State. Article II(b) defines a "Sending State":

> 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

Article II(c) defines a "Receiving State":

> 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

In short, the Government urges that the Agreement only applies to the United States when a state tribunal is seeking to try a federal prisoner in a state court. Such construction would of course simply eliminate the problem but there is nothing at all in the Agreement to support the interpretation now urged by the Government. Article II(a), as we have indicated, defines a State as "a State of the United States; the United States of America, a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico." The statute places the United States on the same footing as any State which is a signatory to the compact. *United States* v. *Sorrell, supra,* 413 F. Supp. at 140. There is admittedly nothing at all in the Agreement itself to support the distinction proffered by the Government. In fact a reading of Article II(a)(b) and (c) compels the conclusion that the United States is both a sending and receiving State.

The Government maintains that the motivation for the congressional enactment of the Agreement was such holdings as *Dickey* v. *Florida*, 398 U.S. 30 (1970) and *Smith v. Hooey*, 393 U.S. 374 (1969) which re-

quired the states to make a diligent effort to bring a defendant to trial even though he is serving a sentence in a federal penal institution. The Agreement, it is argued, provides a legal basis enabling the states to procure federal prisoners thus preserving the Sixth Amendment constitutional rights of these prisoners to a speedy trial. S.Rep.No. 1356, 91st Cong., 2d Sess., 3 U.S. Code & Admin. News 4864 (1970). The Government in its brief here states that "it appears that federal participation was not sought until the Supreme Court decided *Smith* v. *Hooey*, 393 U.S. 374 (1969)."[6] The legislative history of the Agreement, however, establishes that the Department of Justice recommended the identical legislation in the 90th Congress; that it was passed by the House on May 9, 1968 but that the Senate failed to act.[7] H.Rep. 1018, 91st Cong., 2d Sess. 1-2 (1970); 116 Cong. Rec. 13999 (1970).

In any event, aside from the fact that the Agreement as enacted fails to make the distinction now sought by the Government, Article VIII itself provides, "This agreement shall enter into *full force and*

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[6] Government brief at 7.

[7] Judge Bartels also noted below the letter of Graham W. Watt, Assistant Commissioner of the District of Columbia, to the Chairman of the House Committee on the Judiciary, in which it was clearly indicated that the United States would be participating as a receiving State. *United States* v. *Mauro*, 414 F. Supp. 358, 361 (E.D.N.Y. 1976). There is little doubt that this letter is part of the legislative history. See *Hoffman* v. *Palmer*, 129 F.2d 976, 987-88 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943).

effect as to a party State when such State has enacted th same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same" (emphasis supplied). The Senate and House Reports specifically noted this language. S.Rep.No. 1356, 91st Cong., 2d Sess., 3 U.S. Code & Admin. News 4864, 4866 (1970); H.Rep.No. 1018, 91st Cong., 2d Sess. 3 (1970). What the Government seeks here is a judicial repeal of at least part of the Agreement, a request more appropriately addressed to the Congress than to this court. See *Dorszynski* v. *United States*, 418 U.S. 424, 442 (1974).

The Government also urges that by adopting the Agreement the Congress could hardly have intended to annul or repeal the ancient habeas writ which is provided for by statute, 28 U.S.C. § 2241(c)(5). However, this argument overlooks the fact that at the time the Agreement was offered to the Congress only 25 states had adopted the compact. H.Rep. 1018, 91st Cong., 2d Sess. (1970). Obviously the writ, and not the Agreement, would have to be resorted to where the United States sought to obtain a defendant imprisoned in a non-participating jurisdiction. The need for the writ still remains where a prisoner is incarcerated in Alabama, Alaska, Mississippi and Oklahoma. In any event the writ, in our view, is the detainer provided for in the Agreement.

Finally, the Government relies on the proposed Criminal Justice Reform Act of 1975 (S.1), section 3201(a), which provides in part:

> (a) Adoption of the Agreement by the United States—The United States solely as a 'sending state,' and the District of Columbia are parties to the Interstate Agreement on Detainers . . . .

The report of the Senate Committee on the Judiciary on S.1 states that section 3201 the existing enabling act of the Agreement:

> has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of sending state. Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Commitee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ.

While the Senate Committee in 1975 does not believe that the 91st Congress intended to fully adopt the Agreement it enacted in 1970, we agree with Judge Bartels that since S.1 has not yet been enacted by the Congress, it is irrelevant for the purpose of construing the Agreement. It is well established that the views of a later Congress as to the construction of a statute adopted by an earlier Congress have very little, if any, significance. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *Gemsco Inc.* v. *Walling*, 324 U.S. 244, 265 (1945); cf. *N.C.*

Freed Co. v. *Board of Governors of Federal Reserve System*, 473 F.2d 1210, 1217 n. 23 (2d Cir.), cert. denied, 414 U.S. 827 (1973).

In sum, we conclude that the Agreement in clear and unequivocal language commits the United States to all of its terms including Article IV. Any construction which would cast the United States in the role of a limited partner is at odds with the entire spirit and scope of the Agreement. If the United States is to succeed in establishing that the Congress only intended to cover state detainers and not federal detainers, this would certainly represent such a major and substantial departure from the all embracing language employed in Article II, that any contrary intention should be clearly established in the legislative history of the enactment. We have carefully reviewed that history and there is not a single mention of the United States participating only in its capacity as a sending State until the Senate Committee Report on the proposed Justice Reform Act of 1975 (S.1). This reflects, in our view, a recognition by some members of the Congress that perhaps the Congress should not have acted as it did—that the sanctions of Article IV in particular are discomfiting to the Government. However, it is not our role to extricate the United States from the unequivocal terms of the Agreement enacted by the Congress. The indictments below were properly dismissed with prejudice and the orders are affirmed.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent for the reason that the writ of habeas corpus issued by the Eastern District of New York was not a "detainer" but a valid order pursuant to 28 U.S.C. § 2241(c)(5), a federal law which has not been repealed or modified by the Interstate Agreement on Detainers Act ("Detainers Act"). Article IV(e) of the Detainers Act, which requires dismissal where a prisoner produced under that Act is returned to the sending state without trial, therefore does not apply.

The majority, in my view, has failed to recognize and give effect to the significant functional and legal differences between a detainer and a federal writ of habeas corpus. A detainer, as its name implies, is an administrative notification lodged with a prison authority, advising that a certain prisoner in its custody is wanted for prosecution elsewhere and requesting that the prisoner be detained or held to face the out-of-state charge. See S. Rep. No. 1356, 91st Cong., 2d Sess., 1970 U.S. Code and Admin. News, 4864-65. The detainer is not an order commanding or obligating the custodian to produce the prisoner; it is merely a request, usually respected as a matter of comity between states, to detain the prisoner so that a representative of the requesting state may take custody, with the consent and cooperation of the holding state, and transport or release him to the requesting state for the purpose of facing the new charge. Prior to a state's adoption of the Detainers

Act it usually did not surrender the prisoner to the other state until the termination of his incarceration in the holding state, since that state was not obligated, except to the extent that it expressly elected to do so by extradition statute or as a matter of comity, to produce a prisoner who was the subject of a detainer or writ of habeas corpus lodged with it by another state. See, e.g., *May* v. *Georgia*, 409 F. 2d 203, 204 (5th Cir. 1969); Schindler, Interjurisdictional Conflict and the Right to a Speedy Trial, 35 U. Cin. L. Rev. 179, 185 (1966). Similarly the federal government was not under any such obligation, see *Ableman* v. *Booth*, 62 U.S. (21 How.) 506 (1858); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872); Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 353-59 (1930), except to the extent that Congress authorized a prisoner to be transferred to the requesting state, see, e.g., Title 8 U.S.C. § 4085.

Unlike a detainer, a federal writ of habeas corpus ad prosequendum is a federal court order commanding the immediate production of a prisoner at a federal trial. Congress has expressly authorized the federal district courts, without qualification, to issue such writs for the production of a prisoner where "it is necessary to bring him into court to testify or for trial." 28 U.S.C. § 2241(c)(5). Upon being served with a writ of habeas corpus ad prosequendum, the state authority does not treat the writ as a detainer; it turns the prisoner over at once to the federal custodian, usually a U.S. Marshal. Nor is the prisoner

thus surrendered by the state pursuant to any enabling law passed by it, such as the Detainers Act, but pursuant to § 2241, which represents the supreme law of the land, Const. Art. VI, cl. 2, and extends beyond the geographical boundaries of the district court which issued the writ. *Carbo* v. *United States*, 364 U.S. 611 (1961). Upon termination of the federal trial the marshal returns the prisoner to the state's custody and the writ is discharged. At no time does the writ have the effect of a detainer.

Because state authorities have apparently always complied with the commands of such federal writs, the federal government has never, according to our research, been called upon to invoke federal supremacy. See, e.g., *Ex parte Royall*, 117 U.S. 241 (1886), where the Supreme Court stated "That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution," 117 U.S. at 294, but went on to hold that comity required the federal courts to defer passing upon such questions until the applicant had exhausted his state remedies. See, generally, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1048-49 (1970). Similarly in *Carbo* v. *United States*, 364 U.S. 611 (1961), the Supreme Court, in holding that federal district courts have the power to issue writs of habeas corpus ad prosequendum extraterritorially, recognized that the existence of comity between sov-

ereignties made it unnecessary to invoke the Supremacy Clause, stating:

> "In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation." 364 U.S. at 621 n. 20.

However, I have no doubt that if a state institution refused to obey a federal writ of habeas corpus ad prosequendum properly issued pursuant to § 2241 and thus provoked a federal-state confrontation, the writ would be held enforcible against the institution under the Supremacy Clause.[1]

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[1] I am aware of a line of decisions stemming from the Supreme Court's decision in *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922), expressing or implying the view that compliance with a writ of habeas corpus is a matter of comity. See, *e.g.*, *United States* v. *Oliver*, 523 F.2d 253, 258 (2d Cir. 1975); *Lunsford* v. *Hudspeth*, 126 F.2d 653 (10th Cir. 1942); *Nolan* v. *United States*, 163 F.2d 768 (8th Cir. 1947); *United States ex rel. Moses* v. *Kipp*, 232 F.2d 147 (7th Cir. 1956); *Crow* v. *United States*, 323 F.2d 888 (8th Cir. 1963); *Terlikowski* v. *United* States, 379 F.2d 501 (8th Cir.), *cert. denied*, 389 U.S. 1008 (1967); *McDonald* v. *Ciccone*, 409 F.2d 28 (8th Cir. 1969); *United States ex rel. Brown* v. *Malcolm*, 350 F. Supp. 496, 499-50 n. 9 (E.D.N.Y. 1972). None of these decisions, however, involved a refusal by a state to obey a federal writ. Nor do they discuss the question of whether the Supremacy Clause obligates a state to comply with a federal writ. In many of the cases the statements amount to dicta, since the issue was the prisoner's standing to object to the writ.

For these reasons I do not find any inconsistency between these decisions, which recognize the role of comity in securing federal-state cooperation, and a case requiring application of the Supremacy Clause where comity might fail. This

For present purposes the important point is that the Detainers Act applies only to those subject to detainers, not to persons surrendered pursuant to § 2241 writs or to proceedings in connection with which such writs are used. The reasons underlying the adoption of the Detainers Act, furthermore, militate against its being construed as a repeal or modification of § 2241, since they do not pertain to the issuance of a writ of habeas corpus ad prosequendum. The primary purpose of the Detainers Act is to protect a prisoner against the detrimental consequences of a detainer being lodged against him, which prior to the Act caused him to lose various privileges and to remain ineligible for rehabilitation or work programs as long as the detainer remained outstanding, a period usually lasting for the duration of his imprisonment. The Detainers Act enables a prisoner to clear a detainer lodged against him by obtaining a speedy trial of the out-of-state charges which led to the detainer being lodged.

The writ of habeas corpus ad prosequendum, as distinguished from a detainer, has never had any such prejudicial consequences for the prisoner; it is executed at once and, upon return of the prisoner to the state institution, it does not remain outstanding against him as would a detainer. Thus the writ

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issue did not exist in *Ponzi* for the reason that it involved a *state* rather than a federal writ and the question was whether the state had jurisdiction to try a prisoner who had been turned over by federal authorities as a matter of comity.

is wholly unrelated to detainers or their prejudicial consequences.

Nor was Art. IV of the Detainers Act, which permits a state lodging a detainer against a prisoner in another state or in federal custody to request and obtain production of the prisoner for trial unless disapproved by the governor of the sending state, intended to apply to proceedings under § 2241. The purpose of Art. IV is to assure that states which formerly were powerless to obtain production of prisoners held by other states or by the federal government will now be able to secure their presence, subject to certain conditions. One of these conditions is that the receiving state, after obtaining the detained prisoner merely upon request, will not abuse that privilege by returning him untried, since this would have the effect of reinstating and indefinitely prolonging the detainer lodged against him by the receiving state, with its detrimental effects. Since the federal government obtains custody under a § 2241 writ without lodging any detainer, Art. IV does not have any effect on its action.

That Congress, in adopting the Detainers Act, did not intend to classify federal writs of habeas corpus as detainers or to subject such writs to the limitations of the Act, is further evidenced by the following later statement of the Senate Committee on the Judiciary, issued when it expressly recommended clarification of the matter in the proposed Criminal Justice Reform Act of 1975 (S. 1):

> "Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ."

Although this statement post-dated the adoption of the Detainers Act, it is significant for the reason that 12 of the 15 members of the Committee who issued it had been members who joined in the original report recommending adoption of the Detainers Act (Sen. Rep. 91-1356).

The Third Circuit's recent decision in *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830 (3d Cir. 1975), relied upon by the majority, is clearly distinguishable. In that case the court properly treated a Monmouth County, New Jersey, writ of habeas corpus as a detainer under the Detainers Act, holding that dismissal of a New Jersey charge against a federal prisoner obtained under such a writ would be mandated by Art. IV(e) of the Act if the plaintiff should prove that the state returned him to federal custody in Danbury, Connecticut, without trial. The essential distinguishing feature, of course, was that the New Jersey writ, unlike the federal writ in the present case, could not, independent of the Detainers Act, have effectively commanded the federal authorities at Danbury to produce or release the prisoner

for trial in New Jersey. It could only function as a detainer or request under Art. III of the Detainers Act, and it was so treated by the court.

Thus nothing in the language or legislative history of the Detainers Act indicates any intent on the part of Congress to repeal or modify § 2241 or to supplant federal writs of habeas corpus, which serve one distinctive purpose, with detainers, which serve another. The two statutes do not conflict with one another. When they are so easily reconcilable, it is error, in my view, to hold in effect that § 2241 is implicitly repealed in part by the Act. See *Rosenkrans* v. *United States*, 165 U.S. 257 (1897).

Accordingly I would hold that where a federal court obtains the presence of a prisoner for pleading or trial by a writ of habeas corpus ad prosequendum issued pursuant to 28 U.S.C. § 2241(c)(5), Art. IV (e) of the Detainers Act has no application.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-six day of October one thousand nine hundred and seventy-six.

Present: Hon. Robert P. Anderson
Hon. Walter R. Mansfield
Hon. William H. Mulligan
Circuit Judges,

76-1251
76-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JOHN MAURO, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by _____
VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of March, one thousand nine hundred and seventy-seven.

Present: Hon. Robert P. Anderson,
Hon. Walter R. Mansfield,
Hon. William H. Mulligan,
Circuit Judges.

76-1251
76-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JOHN MAURO, DEFENDANT-APPELLANT.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JOHN FUSCO, DEFENDANT-APPELLEE.

A petition for a rehearing having been filed herein by counsel for the appellant, United States of America,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifteenth day of March, one thousand nine hundred and seventy-seven.

76-1251
76-1252

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JOHN MAURO, DEFENDANT-APPELLEE.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

JOHN FUSCO, DEFENDANT-APPELLEE.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by counsel for the appellant, United States of America, and no active judge or judge who was a member of the panel having requested a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75-CR-816

UNITED STATES OF AMERICA

—against—

JOHN MAURO, DEFENDANT

BARTELS, District Judge

In this proceeding the Court is confronted with the difficult question of interpreting a federal statute in a manner which, according to the express meaning, raises in the mind of the Court grave doubts as to whether its objectives could have been accomplished in a more practical manner. The facts appear as follows.

On December 12, 1974, the defendant, John Mauro, was sentenced to a term of imprisonment for three years to life by the State of New York. On May 7, 1975, while in the custody of the State of New York, he was subpoenaed to testify before a federal grand jury sitting in the Eastern District of New York and was produced pursuant to a Writ of *Habeas Corpus Ad Testificandum*. The defendant received a grant of immunity signed on May 12, 1975, by Judge Costantino. Subsequently, when the defendant re-

fused to answer questions before the grand jury, after having been ordered to do so by Judge Costantino, he was held in civil contempt and sentenced to a prison term of six months or the life of the grand jury, whichever was longer, upon the condition that he could purge himself by testifying at any time during the grand jury term. The defendant having continued his refusal to testify, the United States, on July 9, 1975, lodged a detainer against him at the Auburn Correctional Facility charging him with contempt of court, and thereafter on July 30, 1975, he was returned to the custody of the State of New York. On November 11, 1975, the defendant was indicted in the Eastern District of New York for criminal contempt of court in violation of 18 U.S.C. § 401.

Pursuant to a Writ of *Habeas Corpus Ad Prosequendum*, issued on November 5, 1975, the defendant was thereafter produced in the Eastern District on November 24, 1975, and on December 2, 1975, he was arraigned on the indictment and pled not guilty. On that date, to accommodate the defendant's counsel, the trial date was set for March 17, 1976, after the Court offered the dates of February 4, 1976, February 9, 1976, and March 3, 1976. On December 11, 1975, the defendant was again returned to state custody without having been tried on the charge of criminal contempt. Subsequently, on April 23, 1976, the defendant was again produced in Federal court pursuant to a Writ of *Habeas Corpus Ad Prosequendum*, issued on April 14, 1976, for the purpose of trial.

In 1970 Congress adopted, on behalf of the United States and the District of Columbia, the Interstate Agreement on Detainers, 18 U.S.C. Appendix ("Agreement"), which, along with similar enactments in thirty-nine states, provides a uniform procedure whereby each of the participating jurisdictions can readily obtain the presence of criminal defendants incarcerated in other participating jurisdictions. It is the interpretation of Article IV of the Agreement with which this Court is now concerned. However, to understand that Article, reference must be made to Article III which provides that when one jurisdiction files a detainer on a defendant incarcerated in another jurisdiction the existence of that detainer must be made known to the defendant who then has the option of demanding in writing a trial on the charges in the other jurisdiction forming the basis of the detainer. If the defendant makes such a demand to the proper authorities he must be transferred to the jurisdiction filing the detainer and must thereafter be tried within 180 days of the formal written demand or the indictment must be dismissed. Article IV provides that the jurisdiction filing the detainer may at its option request the custody of the defendant for the purpose of trial even if the defendant has not made a written demand for trial pursuant to Article III. In such event, however, a trial on the charges forming the basis of the detainer must, under Article IV(c), be commenced within 120 days of the defendant's arrival in the receiving jurisdiction. Article IV(e) further provides:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

The defendant now moves for an order dismissing the indictment pursuant to Article IV(e) of the Agreement on the ground that the Government failed to try him on the federal charges before returning him to state custody in violation of that Article, and on the further ground that at the time he was held in civil contempt he was not advised of the Government's contemplated indictment for criminal contempt.

As set forth in Article I of the Agreement, the policy and purposes of the Agreement are to insure the speedy trial of a defendant subject to charges in another jurisdiction by way of a detainer, to eliminate the adverse effects upon programs of prisoner treatment and rehabilitation caused by uncertainty surrounding those charges, and to create cooperative procedures to secure the presence of defendants incarcerated in other jurisdictions. See also 3 U.S. Code Cong. & Adm. News 4864 (1970). More specifically, the Agreement was executed to eliminate the problem which arose when one jurisdiction tried, convicted and incarcerated a defendant and thereafter another jurisdiction lodged a detainer against the individual and simply waited to try the defendant after his release from the custody of the first jurisdiction. Often this procedure caused the delay of a trial for many years and, in addition, provided a Damoclean Sword over the defendant which would not only have an adverse psychological impact upon the defendant but would also impede the efforts of the incarcerating jurisdiction to rehabilitate the defendant since, among other things, it would render the defendant ineligible for probation or parole. *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830, 836-7 (3d Cir. 1975); *United States* v. *Cappucci*, 342 F. Supp. 790 (E.D.Pa. 1972); 116 Cong. Rec. 14000 (1970). As indicated above, the predicate for the defendant's motion is the fact that he was produced in this Court on November 24, 1975 pursuant to a writ and was returned to state custody on December 11, 1975 without being tried.

I

In opposition the Government argues that when Congress adopted the Agreement on behalf of the United States it did so only as a sending state and not as a receiving state. Therefore it is argued that when the United States receives a state prisoner for the purpose of trial, it is not subject to the sanctions imposed by Article IV because it did not adopt the Agreement as a receiving state. In support of its position the Government asserts that the legislative history demonstrates that when Congress adopted the Agreement it was solely concerned with making a procedure available to the states for securing the

presence of federal prisoners so that the states could satisfy the speedy trial requirements of the Constitution as mandated by the Supreme Court in *Smith* v. *Hooey*, 393 U.S. 374 (1969), and *Dickey* v. *Florida*, 398 U.S. 30 (1970). Because a federal Writ of *Habeas Corpus Ad Prosequendum* issued pursuant to 28 U.S.C. § 2241 is valid legal process throughout the United States binding against the states for the purpose of obtaining custody of state prisoners for a federal trial, *Carbo* v. *United States*, 364 U.S. 611 (1961), the Government asserts that it was unnecessary for the United States to adopt the Agreement as a receiving state. Furthermore, it claims that Congress never intended to restrict the effect of 28 U.S.C. § 2241 or to alter the delicate federal-state relationship under the Supremacy Clause of the Constitution, Article VI. We cannot agree.

Nowhere in the text of the Agreement or in the prefatory enabling portions of its enactment is there any specific indication that the United States was becoming a limited participant as a sending state. In fact, the text itself suggests that the United States entered into the Agreement on the same terms as all other participating states. Article II(a) defines the term "State" to mean:

> "a State of the United States; *the United States of America*; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico." [Emphasis added.]

See *United States* v. *Cappucci*, *supra*. Article II(c) defines a "receiving state" as a "*State* in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof." [Emphasis added.] Certainly under the express wording of the Agreement itself the United States is a receiving state and there is nothing in the Agreement excluding the United States from that status. In fact, for the purposes of an Article III request by a state prisoner for trial on federal charges the United States has been treated as a receiving state subject to the sanctions imposed by that Article. See *United States* v. *Mason*, 372 F.Supp. 651 (N.D. Ohio 1973).

Nor does the legislative history, which is sparse at best, alter this result. While it appears from the Senate Report that Congress was obviously responding to the need of the states for a procedure to secure the presence of federal prisoners in order to provide a speedy trial on their state charges and to escape the effect of the rulings in *Smith* v. *Hooey*, *supra*, and *Dickey* v. *Florida*, *supra*, the report also indicates that "the agreement shall enter into *full force and effect* as to a party 'State' when such State has enacted the same into law." [Emphasis added.] 3 U.S. Code Cong. & Adm. News 4864, 4866 (1970). Nowhere in the legislative history does Congress indicate that the United States is under any lesser obligation as a "State" than other states adopting the Agreement or that the Agreement has less than full force and effect against the United States as a "State" as that term is defined in the Agreement. In

fact, in a letter from Graham W. Watt, Assistant Commissioner of the District of Columbia, dated March 2, 1970, to Congressman Emanuel Celler, Chairman of the Committee on the Judiciary, which is included in the legislative history, it was stated that:

> "H.R. 6951, if passed, will also enable the Attorney General or his representative to have a prisoner against whom he has lodged a detainer for violation of an offense against the United States and who is serving a term of imprisonment in any party State made available for disposition of such detainer."

3 U.S. Code Cong. & Adm. News 4869 (1970). This statement demonstrates that it was anticipated that the United States would be participating in the Agreement as a receiving state as well as a sending state.[1] Moreover, the statute enacted was the "Interstate Agreement on Detainers" which was also enacted by thirty-nine other states. It is difficult to understand how the Federal Government could possibly become a party to such "Agreement" on its own

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[1] In referring to the possibilities applicable to the District of Columbia this letter made a distinction between the District prosecuting authorities and the Attorney General by asserting that the Agreement would also enable (1) District prisoners to require state authorities to try them on state charges, (2) state prisoners to demand a trial on charges arising out of the laws of the District, and (3) "District prosecuting authorities to have a prisoner in a party State made available for disposition of local detainers." 3 U.S. Code Cong. & Adm. News 4869-4870 (1970).

terms without the consent of the other states which were already bound to each other on different terms. It is true that the Government could enact a special statute limiting its obligation to that of a spending state but that is quite different from becoming a party to an agreement the terms of which have already been fixed by the other states.

The Government additionally contends that the congressional purpose of limiting the participation of the United States in the Agreement to a sending state is enunciated in § 3201(a) of the Criminal Justice Reform Act of 1975 (commonly referred to as "S-1") which was introduced in the Senate on January 15, 1975 and is still pending. That section provides:

> "(a) Adoption of Agreement by the United States—The United States, solely as a 'sending state,' and the District of Columbia are parties to the Interstate Agreement on Detainers . . . ."

In a report of the Committee on the Judiciary, United States Senate, on the provisions of S-1 the Committee in referring to § 3201(a) stated that the existing enabling act of the Agreement

> "has been amended to clarify the intent of Congress by providing that the Federal Government is a participant in the Agreement only in the capacity of a 'sending state.' Federal prosecution authorities and all Federal defendants have always had and continue to have recourse to a speedy trial in a Federal court pursuant to 28 U.S.C. 2241(c)(5), the Federal writ of *habeas corpus ad prosequendum*. The Committee does

> not intend, nor does it believe that the Congress in enacting the Agreement in 1970 intended, to limit the scope and applicability of that writ."

We find that for the purpose of determining the intent of the Ninety-First Congress in enacting the Agreement, both the provisions of S-1 and the Committee comments thereon are today irrelevant for the following reasons: (1) S-1 has not yet been enacted by Congress and may never be, (2) there is no assurance that the Congress as a whole will accept § 3201(a) as part of S-1 when and if it finally is enacted and (3) no subsequent Congress is in a position to express the intent of a previous Congress in enacting legislation.

Finally, we cannot lose sight of the fact that one of the express congressional purposes in adopting the Agreement was to ameliorate the adverse and disruptive effects upon rehabilitation programs caused by detainers and uncertainty over their ultimate disposition. Such effects are equally present when federal authorities receive state prisoners as when state authorities receive federal prisoners. Article IX of the Agreement provides that the Agreement be liberally construed so as to effectuate its purposes and such a construction would prohibit a differentiation between disruption of state and federal rehabilitation programs.

We conclude, therefore, that the United States is participating in the Agreement as both a sending

and a receiving state. In so concluding we are cognizant of the principle of statutory interpretation at times invoked by Judge Learned Hand where he observed under different circumstances that:

> "There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of over solicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it."

Federal Deposit Insurance Corp. v. *Tremaine*, 133 F.2d 827, 830 (2d Cir. 1943). See *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960). But here it is apparent that Congress failed to foresee or consider, one way or the other, the particular problem presently before the Court and failed to express in the statute or its legislative history any intent to limit the participation of the United States. It is possible that if brought to its attention Congress would have adopted the Agreement solely as a sending state subject to the consent of the other states, but this is only speculation and we cannot undo what it has done. If the statute requires amending, Congress knows how to do it, as for example in S-1, but there is no basis for this Court to legislate under the guise of construction by limiting the participation of the United States to that of a sending state. *Dorszynski* v. *United States*, 418 U.S. 424, 442 (1974).

II

In the alternative the Government argues that no detainer for the criminal contempt indictment was ever lodged against the defendant and that he was produced on November 24, 1975 only pursuant to a Writ of *Habeas Corpus Ad Prosequendum* issued under 28 U.S.C. § 2241(c)(5) and not pursuant to the terms of the Agreement. The Government contends that having failed to invoke the provisions of the Agreement Article IV(e) is inapplicable and, accordingly, there is no basis for dismissing the indictment. We agree, however, with the reasoning of the Third Circuit in *United States ex rel. Esola* v. *Groomes, supra*, at 836-37, that whenever the Agreement is available for securing the presence of a defendant for the purpose of prosecution it is the exclusive means for doing so and the Government is charged with having invoked its provisions by use of the writ. See *United States* v. *Ricketson*, 498 F.2d 367, 373 (7th Cir. 1974). Any other result would provide an easy means for circumvention of the terms of the Agreement and render them meaningless.

Once the Government has obtained the custody of a defendant under the Agreement, it is subjected to two restraints: (1) the defendant must be tried within 120 days after arrival in federal custody, Article IV(c), and (2) the defendant must be tried before being returned to the custody of the state, Article IV(e). *United States ex rel. Esola* v. *Groomes, supra; United States* v. *Ricketson, supra.*

Here the defendant was returned to state custody before being tried under the apparent misapprehension that he could be returned for trial at any time after arraignment subject to compliance with the speedy trial requirements of the Court. The Government was simply in error in not remembering the terms of the Agreement.[2]

The Government having returned the defendant to state custody in violation of Article IV(e), the defendant's motion to dismiss the indictment must be and hereby is granted.

SO ORDERED.

Dated: Brooklyn, N.Y., May 17, 1976.

/s/ John R. Bartels
United States District Judge

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[2] It should be noted that by being compelled to retain a defendant in federal custody after arraignment the Government would be charged with the custodial expenses until it returned the defendant to the state which could exceed four months. See Article V(h) of the Agreement. A more practical solution would be an amendment to the Agreement permitting production of the defendant in the receiving state for arraignment, requiring return to state custody within 10 days and thereafter applying the requirements of Article IV(e).

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